ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 302 of the Telecommunications Act of 1996	)	CS Docket No. 96-46
	)	
Open Video Systems	)	

REPLY COMMENTS

OF

BELL ATLANTIC

BELLSOUTH

GTE

LINCOLN TELEPHONE

PACIFIC BELL

SBC COMMUNICATIONS

April 11, 1996

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SUMMARY

The various parties filing comments in this proceeding fall generally into three groups: (1) those who want open video systems to be a viable business option; (2) those who say that they want open video systems to be a viable business option, but do not; and (3) those pleading special interests. The first group, having experienced video dialtone's death by regulation, argue for flexible regulation with substantial reliance on the dispute resolution process, consistent with the 1996 Act. The second group, having instigated video dialtone's death by regulation, argue for a similar approach to open video systems. The third group generally supports any rule that promotes their interests.

Congress aligned itself with the first group. If Congress had believed that detailed, front-loaded regulation would promote competition and diversity in the cable business, it would not have terminated the video dialtone rules or eliminated the Section 214 requirement. The cable lobby would recreate video dialtone, because they have little to gain and much to lose if open video systems become an attractive competitive option.

The cable lobby's two-fold strategy for derailing open video systems is identical to their successful video dialtone strategy: (1) promote the idealized view that open video systems should be as open as the public switched telephone network and insist on a prophylactic rule for every conceivable way in which operators might fall short of that ideal; and (2) postulate rampant cross-

subsidization and insist on draconian, costly, and uneven rules to ensure there can be no misallocation of costs.

The cable lobby obstinately ignores the Commission's intent to "implement the requirements of the open video system framework in a way that will promote Congress' goals of flexible market entry, enhanced competition, streamlined regulation, diversity of programming choices, investment in infrastructure and technology, and increased consumer choice." The Commission must reject the heavy-handed, prospective regulation proposed by the cable lobby, or there will be no open video systems. Instead, the Commission should simply promulgate rules that codify the requirements of Section 653, adopt a streamlined certification process, and then rely on the dispute resolution process to enforce compliance. The Commission must not allow the cable lobby to smother open video systems before they can become a viable competitive option.

Only rules that enable open video systems to be competitively viable and that entail significantly less regulation than cable franchises will encourage local exchange carriers and others to deploy such systems. For this reason, the Commission must also reject all attempts by local governments to impose franchise-like regulation on open video systems. Without exception, the parties that have a genuine interest in the success of open video systems urge the Commission to minimize regulation -- both federal and local -- and maximize business flexibility. These commenters caution against repeating the mistakes of video dialtone: inflexible Title II or Title II-like rules, detailed prospective resolution of hypothetical issues in rules, and multiple, open-ended layers of approval that provide opportunities to obstruct the entry of competitive operators.

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Reply Comments

The undersigned Joint Parties[1] submit these reply comments in response to comments filed on April 1, 1996, addressing issues in the *Notice Of Proposed Rulemaking* (FCC 96-99), released on March 11, 1996 ("Notice").

I. INTRODUCTION

The various parties filing comments in this proceeding fall generally into three groups: (1) those who want open video systems ("OVS") to be a viable business option; (2) those who say that they want OVS to be a viable business option, but do not; and (3) those pleading special interests. The first group, having experienced video dialtone's death by regulation, argue for flexible regulation with substantial reliance on the dispute resolution process, consistent with the 1996 Act[2]. The second group, having instigated video dialtone's death

[1] Bell Atlantic Telephone Companies and Bell Atlantic Video Services Company; BellSouth Corporation and BellSouth Telecommunications, Inc.; GTE Service Corporation and its affiliated domestic telephone operating companies and GTE Media Ventures, Inc.; Lincoln Telephone and Telegraph Company; Pacific Bell; SBC Communications Inc. and Southwestern Bell Telephone Company.

[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, enacted February 8, 1996 ("1996 Act").

by regulation, argue for a similar approach to OVS.[3] The third group generally supports any rule that promotes their interests.

The Commission understands that Congress aligned itself with the first group.[4] If Congress had believed that detailed, front-loaded regulation would promote competition and diversity in the cable business, it would not have terminated the video dialtone ("VDT") rules or eliminated the Section 214 requirement. The parties in the second group, primarily incumbent cable operators and their lobbying groups, would recreate the VDT experience, because they have little to gain and much to lose if OVS becomes an attractive competitive option.[5]

The cable lobby's two-fold strategy for derailing OVS is identical to their successful VDT strategy: (1) promote the idealized view that OVS should be as open as the public switched telephone network and insist on a prophylactic rule for every conceivable way in which operators might fall short of that ideal; and (2) postulate rampant cross-subsidization and insist on draconian, costly, and uneven rules to ensure there can be no misallocation of costs. The cable lobby obstinately ignores the Commission's intent to "implement the requirements of the open video system framework in a way that will promote Congress' goals of

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[3] Some of these parties allege various violations of the VDT rules by certain of the Joint Parties. See generally comments of Cablevision, the California Cable Television Association, and Rainbow Programming Holdings. These allegations have been rebutted in other proceedings and need not be addressed here.

[4] Notice ¶¶ 2-6.

[5] While the Commission may and should allow cable operators to become OVS operators, there is little incentive for cable operators to take advantage of that option as long as they have a *de facto* monopoly in the wireline delivery of video programming.

flexible market entry, enhanced competition, streamlined regulation, diversity of programming choices, investment in infrastructure and technology, and increased consumer choice."[6] Similarly, the third group ignores Congress' mandate that OVS be subjected to lesser regulatory burdens. The Commission must reject heavy-handed, prospective regulation or there will be no open video systems. Instead, the Commission should simply promulgate rules that codify the requirements of Section 653 and then rely on the dispute resolution process to enforce compliance.

II. DISCUSSION

A. OVS Rules Must Afford Operators Flexibility To Fashion Systems That Can Compete Successfully.

Only rules that enable OVS to be competitively viable and that entail significantly less regulation than cable franchises will encourage local exchange carriers and others to deploy OVS. Without exception, the parties that have a genuine interest in the success of OVS urge the Commission to minimize regulation and maximize business flexibility. These commenters caution against repeating the mistakes of VDT: inflexible Title II or Title II-like rules, detailed prospective resolution of hypothetical issues in rules, and multiple, open-ended layers of approval that provide opportunities for incumbents to obstruct competitive entry.

For instance, Henry Geller recommends

[6] Notice ¶ 4.

> that with only a few exceptions where clarification is clearly needed at this time (e.g., how to measure the operator's one-third share of activated channels where it can select the programmer), the Commission should **avoid adopting specific rules** to flesh out in some detail the approaches to be taken in areas like channel allocation, analog/digital, channel positioning, just and reasonable rates, access for cable operators, etc. . . . Rather . . . the Commission should generally **repeat the statutory standards, call for good faith negotiation between the OVS operator and programmers, and promptly resolve disputes** . . . within the short time frame prescribed by the statute (180 days). In this way, telcos and others will be encouraged to enter the OVS field, the Commission will quickly gain expertise through concrete market developments, and can act to remedy specific cases and to develop specific rules on the basis of the market experience so gained.[7]

The wisdom of this proposal is hidden only to those who have a stake in the status quo.

Programmers not affiliated with incumbent cable operators, such as the members of Access 2000, an association of independent program producers, recognize that consumers will be better served by the successful deployment and operation of OVS than by a truckload of carefully crafted rules and procedures. Access 2000 "urges the Commission to establish incentives [for] telephone companies to build and operate" OVS and to "provide for maximum business flexibility, minimum regulation, and appropriate oversight and review" through the complaint process.[8]

The Joint Parties endorse a similar Viacom proposal: "To provide OVS operators not only with reasonable flexibility but also the regulatory certainty necessary to proceed with confidence, . . . the Commission [should] couple its

[7] Alliance For Public Technology ("Geller") at 7-8 (emphasis added).

[8] Access 2000 at 7.

broad prescriptive rules with some 'safe harbor' examples of practices that would be deemed presumptively fair and reasonable."[9] The Joint Parties have proposed rules that do exactly what Viacom and Access 2000 have proposed.[10]

Perhaps, the most compelling evidence that restrained, flexible regulation is essential for the competitive success of OVS is found in the comments of parties representing incumbent cable operators. Without exception, those parties argue for heavy-handed regulation.[11] To support their positions, the cable lobby focuses exclusively on a purported need for strict regulation to ensure that video programming providers will be able to compete against OVS operators. The cable lobby ignores the primary premise of OVS: the absolute need for OVS operators and unaffiliated video programming providers to compete against incumbent cable operators. If the rules do not first secure the competitive viability of OVS, any rules to protect unaffiliated video programming providers will be futile.

Understanding that over-regulated OVS will not be deployed, the cable lobby argues that the Commission should impose detailed regulations governing all aspects of OVS, including rules that unaffiliated video programming providers can compete against OVS operators. Congress, however, focused on ensuring a genuine opportunity for unaffiliated video programming providers to select

[9] Viacom at 8.

[10] Joint Parties, Appendix A.

[11] The motives of the various cable commenters, who assert the right to be open video system operators themselves, but seek every opportunity to sabotage that option, are transparent. See, e.g., NCTA at 27 et seq.

programming on a substantial portion of the system, but not on ensuring competition between the operator and other providers on the system.[12] Indeed, Congress expressly permits operators to market the programming of all providers to subscribers,[13] presumably because Congress recognized that cooperative relationships between OVS operators and other programming providers are far more likely to promote robust two-wire video competition than are onerous rules designed to ensure Title II-like openness. As Viacom observes:

> [T]he emergence and viability of OVS in the multichannel marketplace will hinge directly on whether LECs and other potential OVS operators are afforded sufficient flexibility to make Open Video Systems an attractive business option. **To insist too strictly on securing the most broadly conceived notion of "open" access imaginable from OVS would be ultimately self-defeating.** . . .

The cable lobby urges the Commission to adopt numerous requirements that will competitively cripple OVS and thereby discourage deployment. The following paragraphs discuss the most extreme proposals, but the Commission will fail to implement the will of Congress if it adopts any rule based on the recommendations of the cable lobby.

1. CARRIAGE OF VIDEO PROGRAMMING PROVIDERS

a) Carriage of incumbent cable operators

Section 653(b)(1)(A) requires the Commission to prescribe regulations that "except as required pursuant to section 611, 614, or 615, prohibit an

[12] Joint Parties at 11-13.

[13] 1996 Act § 653(b)(1)(B).

operator . . . from discriminating among video programming providers with regard to carriage on its open video system . . . ."[14] The cable lobby argues that this language prohibits absolutely any discrimination in carriage except for PEG and must-carry and that therefore OVS operators cannot refuse to provide carriage to operators of cable systems in OVS service areas - even if such refusals are just and reasonable.[15]

No policy goal of Section 653 or any other part of the 1996 Act will be served by forcing OVS to provide carriage to competing cable operators. To the contrary, such a requirement would undermine the pro-competitive intent of Congress in creating the OVS option. The anti-competitive effect of the interpretation advanced by the cable parties is wholly inconsistent with the congressional purpose "to maximize competition between local exchange carriers and cable operators within local markets".[16]

When cable's interpretation is juxtaposed with their other positions, its flaws are obvious:

(1) For example, NCTA argues that OVS operators must be limited to one-third of the activated channel capacity in all situations in which demand exceeds capacity, including when only one other video programming provider is seeking capacity.[17] Read with its interpretation

[14] 1996 Act § 653(b)(1)(A).

[15] NCTA at 29-31; Comcast at 3; Cox at 2; Continental at 10; American Cable at 14.

[16] Conference Report at 174. See also Viacom at 10; MFS at 24-26.

[17] NCTA at 14-15.

of the carriage requirement, this position would require an OVS operator to permit the incumbent cable operator, if it is the only other video programming provider requesting capacity, to commandeer a substantial portion of the OVS. For example, if an OVS had 90 channels, of which 15 were required for PEG and must-carry, the operator could get 30, but the competing cable operator could get 45. Added to the cable operator's existing capacity of 30 or more channels,[18] the capacity captured on the OVS would give the cable operator an insurmountable competitive advantage. No rational business person will invest in a system that his principal competitor can use against him.

(2) NCTA argues that each OVS should be administered by the programming providers or by an independent party selected by all of the programming providers.[19] If the incumbent is one of those programming providers (possibly the only one other than the operator), the operator would be required to permit his principal competitor to share in decisions directly affecting the competition between their respective systems.

NCTA contends that Section 653(b)(1)(A) is unambiguous and that the Commission has no choice but to prohibit all discrimination in carriage except for PEG and must-carry.[20] It is impossible, however, to apply Section 653(b)(1)(A)

[18] *Second Annual Report* (FCC 95-491), *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming* ("Second Annual Report")(CS Docket No. 95-61), released December 11, 1995, ¶ 7.

[19] NCTA at 10.

[20] NCTA at n.1.

without implementing some reasonableness limitation. Carried to its logical conclusion, NCTA's position would require that OVS operators accommodate all requests for carriage at the same time. They could never refuse or postpone carriage of any video programming provider at any time for any reason. Section 653 cannot reasonably be interpreted to impose such an onerous burden. The Commission must resolve the ambiguity in Section 653(b)(1)(A)'s nondiscrimination requirement in a manner that furthers the pro-competitive purpose of Congress and must avoid any interpretation that makes OVS deployment irrational.[21]

b) Analog/digital and channel positioning issues

Several commenters, mostly the cable lobby, argue for separate treatment of analog and digital channels[22] and for strict rules governing channel positioning.[23] Without flexibility to deal with these issues in a manner that responds to local market conditions, OVS operators will be severely handicapped in their efforts to compete against incumbent cable operators. The Commission should not adopt specific rules on these issues, but should make it clear that actions reasonably required to enable the system to compete effectively in local markets justify discrimination.

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[21] If the Commission nevertheless concludes for whatever reason that incumbent cable operators are entitled to OVS carriage as a matter of right, the Act expressly states, and the Commission should expressly confirm, that the system operator may impose reasonably discriminatory terms and conditions that are not unreasonably discriminatory on such carriage.

[22] Comcast at 6; NCTA at 11-12; APTS at 17-18; Continental at 14; TCI at 12; CFA at 30.

[23] American Cable at 19-20; NCTA at 11.

As the Joint Parties stated in their Comments,[24] the Commission should evaluate all proposals for OVS rules by a "litmus test" to determine whether the rules will make OVS a viable competitive option. That test is whether the rules will make OVS an attractive option for cable operators. When that test is applied to this issue, it should be obvious that cable operators will not convert to OVS if they are not permitted sufficient flexibility to maintain their existing analog programming packages.

This flexibility should extend to operators that deploy systems with both analog and digital capacity. Given the cost of equipping systems with digital channels, no operator will deploy digital capacity merely for the sake of greater flexibility in assigning analog channels. Operators will deploy digital capacity only if they believe their digital channels will attract enough programming and subscribers to support the investment. Having made such an investment, they will have compelling financial incentives to promote use of the digital capability. If such operators are afforded flexibility in assigning analog channels to compete effectively against incumbent cable operators, that flexibility will ultimately benefit all programming providers on their systems.

c) Channel counting

The cable lobby's objective on this issue is to minimize the flexibility of OVS operators. NCTA argues for the most restrictive rules for counting the operator's one-third minimum share, even endorsing the error in calculation of

[24] Joint Parties at 5.

"activated channel capacity" at footnote 34 of the Notice.[25] The Commission does not have the latitude to calculate operators' one-third on less than the entire activated channel capacity of the system or to include programming that Congress selected (*i.e.*, must-carry and PEG) in the operator's minimum share. The Commission does have the latitude to resolve ambiguities in favor of greater flexibility for operators (for example, to permit operators to exclude shared channels from their minimum share). The Commission should determine from the outset that it wants OVS to succeed and that it will, therefore, implement the will of Congress by enhancing the business flexibility of OVS operators.

d) Channel sharing

In an effort to make OVS rules as rigid as VDT rules, NCTA contradicts the plain language of Section 653. After quoting the language that permits "an operator of an open video system to carry on only one channel **any** video programming service that is offered by more than one video programming provider,"[26] NCTA directly contradicts that language, asserting that Section 653 "does not authorize the OVS operator to decide that particular program networks should be shared, while others may be offered on an exclusive basis."[27]

Undeterred by a lack of actual information about channel sharing, about the market or technical factors that may affect it, or about actual abuses of channel sharing, NCTA proposes rigid rules to govern this unknown. Operators

[25] NCTA at 6-7.

[26] 1996 Act § 653(b)(1)(C) (emphasis added).

[27] NCTA at 8.

may or may not find channel sharing a practical technique for mitigating capacity limitations and may or may not decide to use it. If, however, it is burdened from the start by requirements not expressed in Section 653, channel sharing will have no opportunity to contribute to the viability of OVS. The Commission should adopt a rule that invokes the language of Section 653 without elaboration.

NCTA also asserts that "channel sharing cannot be required with respect to a particular program network if the packager's arrangement with the program network does not explicitly permit such carriage."[28] No carriage arrangements, including channel sharing, may violate copyright laws or contracts governing the distribution of programming. There is no need for the Commission to adopt rules to enforce copyrights or contracts. NCTA, however, would have the limitations placed by copyright holders on the distribution of their programming operate as a limitation on OVS operators' exercise of the right granted by Section 653(b)(1)(C). The term "channel sharing" is shorthand for a broader right "to carry on only one channel any video programming service that is offered by more than one video programming provider . . . provided that subscribers have ready and immediate access to any such video programming service." In spite of the common use of the term "channel sharing" to refer to this right, channel sharing as such is not necessarily the only legitimate way in which this right can be exercised. For instance, an operator may advise video programming

[28] NCTA at 9.

providers that it will carry a video programming service on only one channel and let the copyright holder to determine which video programming provider it will authorize to carry the programming service on the system as long as all "subscribers have ready and immediate access" to the programming. The Commission should not establish rules that limit OVS operators' flexibility and ability to innovate.

e) Channel administration

Some commenters, NCTA included, contend that the Commission should not permit OVS operators to administer their systems, including assignment of channels, channel positions, and shared channels.[29] This proposal ignores the language of Section 653, which anticipates that operators will administer their systems, which does not authorize the Commission to require third-party administration, and which decrees a dispute resolution process to deal with allegations of improper administration by operators. Section 653 places squarely on the operator, not another administrator, the responsibility for compliance with its requirements. If a third-party administrator were truly independent of the operator, as some proposals contemplate, operators would find it difficult or impossible to exercise sufficient control to ensure that administrators' actions would not put operators in violation of Section 653. The only purpose served by a third-party administration requirement would be to make open video systems totally unattractive objects of investment. No prudent

[29] NCTA at 3.

business would cede total control of its investment to an independent third party, particularly one that its principal competitor could help select and govern.

f) Changes in demand/capacity

NCTA acknowledges that requiring an operator to make immediate adjustments in channel assignments to accommodate changes in demand "could cause unjustified disruption to the entity's business plans and to the expectations of customers."[30] NCTA does not, however, support a transition sufficient to prevent these recognized harms. NCTA would allow no more than a year for transition. Such a short period would seriously undermine the operators' ability to enter into market-based contracts for programming it has selected or contracts with other video programming providers in order to free capacity for new demand. A transition period would not be reasonable unless it permitted operators to enter into contracts for durations common in the video industry or to make adjustments without violating existing contracts. The Joint Parties have recommended that operators be given a reasonable period to make capacity available. Viacom's proposal is similar and warrants serious consideration:

> [T]he certainty required for viable business planning would be undercut if subsequent expansion of, or demand for, capacity would trigger an obligation that any program packager (including the OVS affiliate) relinquish channels it has previously secured. Neither consumers nor programmers would be served by a Commission rule obligating or (explicitly or implicitly) permitting the OVS operator to abrogate any program affiliation agreements on this basis. Instead, if the OVS-affiliated packager's use of capacity after the initial enrollment exceeds the one-third cap, the operator should be required to make new capacity available

[30] NCTA at 15.

> to unaffiliated program packagers on a fair and reasonable basis -- perhaps by limiting the OVS-affiliated packager to no more than one-third of any new capacity if oversubscription recurs.[31]

NCTA also proposes that operators be required to make capacity available on a part-time basis as a means of dealing with changes in demand.[32] NCTA fails to explain how a part-time capacity requirement would address changes in demand, however. NCTA argues that "cable operators have been offering public access users blocks of time on channels, rather than requiring their use on a full-time basis."[33] OVS operators will be required to provide public access channels and may find the offering of time blocks expedient in that context. There is no basis, however, in Section 653 for a rule requiring OVS operators to offer part-time carriage. The Commission should leave operators free to address markets as they find them.

g) "The 'Head Start' Problem"

On behalf of incumbent cable operators, whose facilities pass 96 percent of all television households in the nation with a subscriber penetration of over 65 percent,[34] NCTA maintains that the "OVS operator should not use its control over the facility to obtain the marketing advantage of a 'head start' over other programmers."[35] This is another attempt by the cable lobby to shackle OVS to preserve incumbent cable operators' own head start.

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[31] Viacom at 11-12.

[32] NCTA at 15.

[33] NCTA at 14.

[34] *Second Annual Report* ¶ 7.

[35] NCTA at 16.

2. Price, terms, and conditions of carriage

Section 653(b)(1)(A) requires the Commission to prescribe regulations that ensure that the rates, terms, and conditions for OVS carriage are "just and reasonable, and are not unjustly or unreasonably discriminatory." Unlike Title II, Section 653 does not establish a procedure for public filing or review of rates, terms, and conditions prior to their becoming effective. Some parties would, however, have the Commission believe that it must regulate OVS rates, terms, and conditions in the same way it regulates common carrier services,[36] notwithstanding the explicit intent of Congress that neither Title II nor Title II-like regulation be applied to OVS.

NCTA scolds the Commission for paying attention to Congress and anticipating that OVS operators will lack market power. NCTA attempts to establish a false dichotomy between market power in relation to subscribers, which it concedes OVS will lack, and market power in relation to video programming providers.[37] With regard to the latter, NCTA asserts that OVS operators will "control a bottleneck facility and will have strong incentives to use that control to disadvantage competing *programmers*."[38] NCTA fails to explain, because it defies logical explanation, how the second wireline video distribution facility in a community can be a bottleneck facility, particularly when there also

[36] NCTA at 17-20; CCTA at 20; MCI at 9.

[37] The classic test of market power is whether a firm has the ability to raise prices or restrict output. When faced with competition from VDT in Dover Township, another alleged bottleneck facility, the incumbent cable operators reduced subscriber rates or increased their programming carriage capacity or both. Such behavior hardly supports a claim that the new entrant can exercise market power.

[38] NCTA at 18.

are existing satellite and wireless distribution facilities. Open video systems will enter the market with no market power with respect to end users or video programming providers. Heavy-handed, Title II-like regulation of OVS rates, terms, and conditions cannot be justified based on this spurious bottleneck argument. The most effective way to determine whether operators use rates to the disadvantage of other video programming providers is to review rates in response to complaints.

Several parties suggest that operators make OVS contracts public.[39] The Commission should reject this approach as it did in its recent decision not to require cable operators to disclose contracts underlying their leased access rates.[40] Cable operators had argued against public disclosure, because "a requirement that all information supporting the calculation of an operators' highest implicit rates be made public would cause the cable industry to suffer by giving competitors the ability to gain access to proprietary information and thereby **decrease competition**."[41] The Commission refused to adopt a proposal to require public disclosure, stating,

> We believe that this could be unnecessarily intrusive on business relationships between operators and non-leased access programmers. However, we note that upon request from the Commission in the context of a **leased access complaint**, operators are required to justify fully their leased access rates, including by presentation of underlying contracts if

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[39] TCI at 14; NAB at 18; CCTA at 20; CFA at 16; Texas Cities at 5; MCI at 10; NLC at 16.

[40] *Order On Reconsideration* (FCC 96-122), *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, released March 29, 1996, ¶¶ 56 et seq.

[41] Id. ¶ 58 (emphasis added).

> necessary, **subject to the operators' right under our rules to request confidentiality of this information.**[42]

A requirement for the public filing of rates for OVS carriage would be inconsistent with this decision.

NCTA further argues that OVS operators be "required to offer transmission service at the same per channel rate to all customers."[43] The rigidity of such an approach would not enable OVS operators to adapt their rates to market requirements. The result would be rates that were too low for programming with a high market value and too high for programming with a low market value. This approach would be particularly disadvantageous for program producers without an established market position and non-profit programmers.[44] The market-responsive approach proposed by Access 2000 better serves both independent programmers and consumers.

> **OVS operators should be allowed to develop prospective payment models and apply those models to categories of video programmers. Payment could be based upon the number of subscribers, or set as a fixed percentage of a video programmers revenues.** OVS operators and their affiliates should be allowed to develop other business and financial models to develop or license programming that would be distributed over the OVS network. . .[45]

The Commission must give operators significant flexibility to base rates for carriage on relevant market factors and must permit them to justify rate

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[42] Id. ¶ 60 (emphasis added).

[43] NCTA at 19.

[44] A coalition including the Alliance for Community Media and others ask the Commission to mandate discounted rates for not-for-profit programmers (Coalition at 20-22). The Joint Parties oppose any such mandate, but do urge the Commission to afford OVS operators sufficient pricing flexibility to enable them to accommodate such programming.

[45] Access 2000 at 6.

differences based on such market factors. The Commission must avoid treating OVS carriage as a mere transmission service. The Commission should permit the service to develop as the market leads.

3. Certification process

NCTA and others have proposed a burdensome certification process.[46] Because the 10-day approval period mandated by Congress severely constrains cable's opportunity to impede entry, these parties support a requirement for extensive pre-certification filings.[47] NCTA's proposed process would effectively reinstate the Section 214 process in its entirety. Even the Section 214 economic justification requirement would be reincarnated in a proposed requirement to justify rates. This is the sort of burdensome regulation that ultimately defeated video dialtone. NCTA's proposal directly conflicts with Section 653 and the plain intent of Congress that OVS be lightly regulated.

B. Part 64 and Price Cap Regulation Provide Adequate Protection Against Cross Subsidy.

Just as they did for VDT, competitors raise the specter that LECs will cross-subsidize OVS by misallocating OVS costs to common carrier services and imposing higher rates on ratepayers for their telephone service.[48] They argue as a result that the Commission must undertake an extensive cost allocation proceeding before approving any requests for OVS certification.

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[46] NCTA at 38; NLC at 74; CFA at 24; Texas Cities at 5.

[47] NCTA at 38.

[48] E.g. NCTA, Time Warner.

These arguments are nothing more than an attempt by the cable lobby to delay competitive entry and to so hamstring OVS by onerous regulatory constraints that it will never be a viable competitor against incumbent cable operators.

As an initial matter, the assumption by the cable commenters that any form of burdensome cost allocation is necessary is simply wrong. In today's environment, where telephone companies are routinely subject to price cap regulation and where their common carrier services are increasingly subject to competition, any incentive to shift cost has vanished.

As the Commission and courts have repeatedly held, the Commission's existing body of price cap and cost allocation rules effectively eliminate any risk that telephone companies might cross-subsidize non-common carrier services such as OVS.[49] Moreover, the Commission has noted in another context that "[p]roceeding under existing price cap rules is consistent with eliminating regulatory barriers and distorted incentives to efficient investment in

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[49] *Telephone Company-Cable Television Cross-Ownership Rules,* Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking ("Cross-ownership Order"), 10 FCC Rcd 244, ¶¶ 161, 166, 179-182 (1994); *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier I LEC Safeguards*, 6 FCC Rcd 7571, 7577 (1991) ("*Computer III Remand Order*") ("[W]e determine that our existing cost accounting safeguards and those proposed in the Notice constitute a realistic and reliable alternative to structural separation to protect against cross-subsidy...."); *People of the State of California v. FCC*, 39 F.3d 919, 926 (9th Cir. 1994) (price cap and strengthened cost accounting rules address concerns of cross-subsidization of enhanced services provided by RBOCs), *petition for cert. filed*, Nos. 94-1173 (Jan. 4, 1995) and 94-1213 (Jan. 9, 1995); *United States v. Western Electric Co., Inc.*, 993 F.2d 1572, 1580-81 (D.C. Cir.) (information services ban lifted, in part, because of FCC price cap regulation which "reduces any BOC's ability to shift costs from unregulated to regulated activities, because the increase in costs for the regulated activity does not automatically cause an increase in the legal rate ceiling."), *cert. denied*, 114 S. Ct. 487 (1993).